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ALEXANDER L. STEVAS,

80-2173
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

NORMAN M. LIPMAN,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTION PRESENTED

Whether the due process and equal protection components of the Fourteenth Amendment to the Constitution of the United States bar the State of Tennessee from conferring upon its litigation counsel the exclusive power to summon witnesses before him for secret interrogation and production of documents.*

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* Petitioner herein was an appellee in the Supreme Court of Tennessee, as was Thomas H. Shriver, District Attorney General for Davidson County, appearing on relation of the State of Tennessee. Respondent herein was the sole appellant in the Supreme Court of Tennessee.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Norman M. Lipman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Tennessee in the above entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 612 S.W.2d 454 (1981) and reprinted in the Appendix at pp. 1a-15a. The opinion of the Court of Appeals of Tennessee and the final judgments and opinions issued by the Chancery Court of Davidson County reviewed below are unreported; they are reprinted in the Appendix at pp. 16a-34a and 35a-56a, respectively.

JURISDICTION

The opinion of the Supreme Court of Tennessee was rendered on February 2, 1981 and the judgment of that Court was entered on the same date. (App. 57a) Thereafter, a timely petition for rehearing was denied on March 9, 1981. (App. 59a) A timely application for ex-

tension of time to file this petition was filed on June 3, 1981 and granted by Justice Stewart by Order of that same date. This petition is filed within the time allowed in that Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The statutory scheme which Petitioner challenged below was enacted as Chapter 646 of the Tennessee Public Acts of 1976 and has been codified at Sections 8-6-401 through 8-6-406 of the Tennessee Code Annotated. Those provisions read as follows:

> 8-6-401. Authority to give oaths and require testimony.—The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. The attorney general and reporter or his designees are authorized to administer all necessary oaths. [Acts 1976 (Adj. S.), ch. 646, § 1, T.C.A., § 8-630.]
>
> 8-6-402. Investigative demands for production of documents and testimony.—For these purposes, the attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the parties to the inquiry and the party at whose instance he is called, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. No witness called to testify or to produce records, books, documents, writings or other tangible objects under §§ 8-6-401—

8-6-406, shall be required to testify in any county other than his county of residence or the county where the records or tangible objects are found under the witness' control. [Acts 1976 (Adj. S.), ch. 646, § 2; T.C.A., § 8-631.]

8-6-403. Service of Investigative demand.—Service of such civil investigation demand shall be had by a designated representative of the attorney general and reporter handing a copy of the demand to such witness, or if the witness cannot be found, then by leaving a copy of the demand at the residence or usual place of business of the witness. Such process shall run throughout the state but shall not require any witness to testify in any county other than his county of residence or the county where records or tangible objects demanded are found under the witness' control. [Acts 1976 (Adj. S.), ch. 646, § 3; T.C.A., § 8-632.]

8-6-404. Failure to comply with investigative demand.—Failure of any witness to comply with the terms of a civil investigative demand shall be certified to the chancery court of the chancery division in which the witness resides, and such chancery court shall exercise the authority granted it by law in the treating of contempt of court matters, including but not limited to those powers granted in §§ 23-903—23-905; all to the end that the witness shall be compelled to appear to give testimony at the time and place specified by the chancery court [Acts 1976 (Adj. S.), ch. 646, § 4; T.C.A., § 8-633.]

8-6-405. Penalty for failure to testify when served with investigative demand.—Any witness who appears as directed by the civil investigative demand, but upon appearance refuses to testify on matters not privileged by law, shall be punished as prescribed in § 8-6-404 hereof. [Acts 1976 (Adj. S.), ch. 646, § 5; T.C.A., § 8-634.]

> 8-6-406. Witness fees and mileage on investigative demands.—Any witness served with a civil investigative demand shall be paid fees and mileage on the same basis as are authorized to be paid witnesses in the courts of this state. [Acts 1976 (Adj. S.), ch. 646, § 6; T.C.A., § 8-635.]

Petitioner has drawn into question the validity of the foregoing statutory scheme on the ground of its repugnancy to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is the president of an incorporated association of proprietorships, partnerships, and corporations engaged in the wholesale distribution of alcoholic beverages in the State of Tennessee known as the Licensed Beverage Wholesalers of Tennessee, Inc.[1] Respondent is the Attorney General and Reporter of the State of Tennessee. As such, he is the executive head of the legal department of the State. Tenn. Code Ann. § 8-6-102.

Petitioner was served on February 20, 1979 with a document styled "Civil Investigative Demand" (herein-

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[1] At the time the proceedings below were initiated, the association was known as the Wine & Spirits Wholesalers of Tennessee, Inc.

after "CID") returnable some four weeks later,[2] directing him to appear before Respondent, or Respondent's designee, to give testimony and produce documents described in an attachment thereto. The CID and its attachments appear at pp. 69a-84a of the Appendix. Under cover of a letter dated March 2, 1979, Respondent's subordinate mailed "Supplemental Instructions for Attachment 1 of the Civil Investigative Demand" to Petitioner, outlining the timing and manner of document production. These Supplemental Instructions and the transmittal letter appear at pp. 85a-88a of the Appendix.

Petitioner commenced an action in the Chancery Court for Davidson County, Tennessee on May 9, 1979, seeking declaratory and injunctive relief against enforcement of the CID.[3] Petitioner's verified Chancery Court complaint (reproduced at pp. 60a-68a of the Appendix) challenged the CID and its underlying statute on a number of state and federal grounds including the following:

> "11. The statute which purports to authorize the Attorney General and Reporter to issue civil investigative demands . . . is unconstitutional, null, void, and of no force or effect for the following reasons:
>
> "a. * * * *
>
> "b. The statute classifies litigants and potential litigants in the courts of this state and confers upon the Attorney General an unreasonable favored litigant status . . . in violation of the Fourteenth Amendment to the United States Constitution." (App. 62a, 63a)

Upon commencement of the action, the Chancellor issued an order temporarily restraining Respondent from issu-

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[2] By agreement of counsel, the return date had been adjourned to 10:00 a.m. on May 9, 1979.

[3] The Honorable Thomas H. Shriver, District Attorney General for Davidson County, suing on relation of the State of Tennessee, joined as a plaintiff in the case, asserting a claim for relief in the nature of *quo warranto*.

ing, executing, or enforcing any CID's pending a preliminary injunction hearing. (App. 96a)

Prior to the date set for hearing on the request for preliminary injunctive relief, Respondent moved, pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, to dismiss Petitioner's action for failure to state a claim upon which relief could be granted, contending that the enabling legislation was constitutional and the CID in question was proper as a matter of law. Following briefing[4] and oral argument the Chancellor issued his memorandum opinion on June 21, 1979 passing on Petitioner's Fourteenth Amendment challenge as follows:

> *Non-Reciprocal Discovery*
>
> "Plaintiffs' next allegation is that civil investigative demand statute constitute [sic] nonreciprocal discovery which violates the equal protection and due process clauses of the state and federal constitutions. They cite *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973) in support of that proposition. The Court finds that case distinguishable. At *Wardius*' criminal trial, a witness' alibi evidence was struck and *Wardius* was not permitted to testify regarding his alibi as a sanction for his failure to file a notice of alibi in accordance with an Oregon statute which provided that a defendant must give notice five days prior to trial of an alibi defense or he was precluded from relying upon it. There was no provision in the statute that the prosecution give notice of any rebuttal of such defense. The Court found it a violation of due process and 'fundamentally unfair to require the defendant to divulge the details of his own case while at the same time subjected him to the hazard

[4] The federal questions sought to be reviewed by this Court were treated in the briefs filed by Petitioner and Respondent in the Chancery Court. Pertinent extracts therefrom appear at pp. 103a-107a and pp. 100a-102a of the Appendix, respectively.

of surprise concerning refutation of the very pieces of evidence which he discloses to the State.' 93 S.Ct. at 2213.

"T.C.A. § 8-636 provides that materials obtained by the attorney general in the course of proceedings under the CID statutes may be used in legal proceedings. However, this is not the type of use to which the Court spoke in the *Wardius* case. *Wardius* dealt with substantive evidence offered at trial. It is this Court's conclusion that the fruits of precomplaint investigations conducted under the civil investigative demand statute may not be introduced as substantive evidence in the subsequent litigation, but rather must be confined to uses such as impeachment. Once litigation has been initiated, the recipient of a civil investigative demand would be entitled to fully reciprocal discovery under the Tennessee Rules of Civil Procedure." (App. 49a-50a)

Thereafter, on cross-motions for reconsideration, the Chancellor held that certain materials obtained by the Attorney General could be used as substantive evidence in subsequent litigation—

Reciprocal Discovery

"The defendant seeks reconsideration of the Court's ruling regarding reciprocal discovery. The Court has given further consideration to that portion of the opinion, and concludes that evidence which results from the issuance of the CID should be dealt with in the following manner. A distinction should be drawn between documentary evidence and that acquired through oral testimony. Documents obtained by the Attorney General do not become admissible in subsequent litigation as substantive evidence merely by virtue of their status as having been obtained pursuant to a CID; neither do they become inadmissible for any purpose solely because they have been so obtained, although they may be inadmissible for other

reasons. However, oral testimony obtained pursuant to a CID will only be admissible for such purposes as impeachment, and will not be admissible as substantive evidence in subsequent litigation." (Memorandum of July 12, 1979, at p. 4; App. 40a)

The Chancellor entered a final judgment, dismissing the action, on July 20, 1979. (App. 35a-37a) Petitioner duly perfected an appeal to the Court of Appeals of Tennessee by filing a Notice of Appeal in the Chancery Court on August 17, 1979. Among the issues presented for appellate review was the following:

"I. A. * * * * *

"C. *Whether the Secret, Non-Reciprocal Discovery Sought by the Attorney General Violates the Due Process and Equal Protection Clauses of the State and Federal Constitutions.*" (Brief for Appellant at p. 2; App. 109a)[5]

The intermediate appellate court resolved that issue in Petitioner's favor—

"The express purpose of the Statute is to grant to the attorney for the State of Tennesse an awesome power not granted to the attorney for any other litigant or prospective litigant who appears or expects to appear before the courts of this state. It should be emphasized that the power is not conferred upon a state official to be used for the general public good, but is effective only when the State is or expects to be a party to civil litigation. The attorney for the State is authorized to make an ex parte judicial determination favorable to himself and his clients that:

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[5] Tennessee has adopted a simplified appellate process similar to that of the federal courts; writs of error and assignments of error have been abolished. *See* Tenn. R. App. P. 4(d), (h). The federal questions sought to be reviewed were raised and preserved in the Court of Appeals by means of the above-quoted Statement of Issues and at pp. 21-24 of the body of the opening brief.

(a) The State (including its officers and agencies) is a party litigant (to a suit as plaintiff or defendant) or,

(b) 'There is reasonable cause to indicate' that the State (its officers or agencies) will be a party litigant (as plaintiff or defendant at any undefined future time in any type of lawsuit whatsoever in any court whatsoever).

"Upon making such determination, the Attorney General is authorized to require any person (whomsoever) (without any prior determination of reasonable cause to believe that such person actually has or probably has information pertinent to the pending or anticipated litigation) to appear to give testimony and produce documents; but the authority before whom the citizen is to appear is not designated in the act. Upon failure of the recipient to comply with such requirement, the act provides that the Chancery Court *shall* exercise its authority in the treatment of contempt matters: all to the end that the government, litigating with one of its citizens in one of its courts, may have an unequal and unfair advantage in preparation for trial.

"Such favored treatment of one party to litigation without equivalent opportunity to the other party is contrary to even handed justice. See *People* v. *Anaconda Wire and Cable Co.*, 265 N.Y.S. 2d 121 (1965).

"Due process requires reciprocal discovery. *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973). Non reciprocal discovery may be justified only by strong showing of special public interest. Special public interest is not the interest of the State government in the result of litigation to which it is a party. Special public interest involves an area of activity which affects the public safety, health, welfare or morals to the extent of justifying governmental regulations or restraint of the activity. By definition, *special* public interest cannot apply to all

aspects of private life. The act under discussion allows discovery in any area of life so long as it is useful in real or probable litigation of the State.

"In 81A, C.J.S., States, § 374, pp. 994-995 is found the following text:

> 'On entering the Courts as a litigant, the state is bound by the general rules of practice and procedure established by the courts in the discharge of their duties, even though the state sues in its sovereign, as contradistinguished from its proprietary capacity. When the state invokes the aid of the Courts, it must submit to the application of the same principles which govern private suitors, and by bringing an action the state subjects itself to the procedure established for its final and complete disposition in the courts, by way of appeal or otherwise.'

In the view of this Court, a statute such as the one under review, which purports to create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery, which power is not granted to the adversaries of the State in its litigation, is a denial of equal protection under the law (U.S. Constitution, Amendment 14) (Constitution of Tennessee, Article I, Section 17)." (Court of Appeals of Tennessee opinion dated March 28, 1980 at pp. 7-9; App. 24a-26a)

On application by Respondent, the Supreme Court of Tennessee granted permission to appeal on May 19, 1980.[6] The Fourteenth Amendment questions sought to be re-

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[6] In Respondent's Application for Appeal by Permission included as one of the issues presented for review was "[w]hether the Civil Investigative Demand Statutes that grant precomplaint investigatory power to the State through its Attorney General violate the appellee Lipman's state or federal constitutional rights" (App. 115a).

viewed here were briefed by the parties[7] and squarely passed upon by the Supreme Court of Tennessee—

> The Court of Appeals held that the statutes authorizing the issuance of a Civil Investigative Demand are violative of the due process and equal protection provisions of the state and federal constitutions in that they create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery which power is not granted to the adversaries of the State in its litigation . . . citing *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). *Wardius* was an adjudicatory proceeding—a trial of a criminal offense. The defendant was required by statute to give notice of his intent to rely on an alibi defense and to reveal the names of witnesses to be called to establish the alibi, on penalty of being denied the privilege of asserting the defense. The state was not required to reciprocate by giving the defendant the names of witnesses it intended to call to rebut the alibi evidence. The court held that reciprocal discovery is required by fundamental fairness; and, in the absence of fair notice that the defendant would have an opportunity to discover the state's rebuttal witnesses, defendant cannot, consistently with due process requirements, be required to reveal his alibi defense.
>
> We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra.* A CID can be issued by the attorney general and reporter only in two circumstances —one where the state is a party litigant, the other

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[7] Pertinent extracts from Respondent's opening brief (App. 116a-125a) and reply brief (App. 136a-139a) below and from Petitioner's brief below (App. 126a-135a) are included in the Appendix hereto to show the manner in which the federal questions sought to be reviewed were raised and preserved in the Supreme Court of Tennessee.

where there is reasonable cause to indicate the state will be a party litigant. Where the state is a party litigant, adversaries of the state are afforded a procedure for pretrial discovery. *See* Rules 26 through 37 of the Tennessee Rules of Civil Procedure. In those instances where there is reasonable cause to indicate that the state will be a party litigant, the CID is an investigatory proceeding, not an adjudicatory proceeding as in *Wardius, supra.* The purpose of an investigatory proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946).

In *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971), it is pointed out that:

> A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to insure the fairness of such a determination come to bear.

See also, Hannah v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

The advantage, if any, conferred upon the state by having the statutory right to pre-complaint discovery is minimal and is negated upon commencement of an adjudicatory proceeding by the fact that the state's adversary then has full discovery rights. (612 S.W.2d at 457-58; App. 6a-8a)

Petitioner timely sought rehearing in the Supreme Court of Tennessee. The petition for rehearing was denied without opinion on March 9, 1981. (App. 59a)

REASONS FOR GRANTING THE WRIT

The secret, non-reciprocal process granted to the Attorney General of Tennessee by the Tennessee Civil Investigative Demand statute is not simply an investigatory tool, but is a discovery device available at every phase of anticipated and pending litigation involving the State of Tennessee. It affords the state a special advantage over its less favored adversaries in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court of Tennessee, upholding that statute in the face of a challenge to its constitutionality, decided a fundamental federal question under the Due Process Clause in conflict with the reciprocal discovery principles announced by this Court in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). The lack of constitutionally valid justification for the disparity in discovery power afforded the Attorney General as litigant, a power denied to Petitioner as either a target of planned litigation or actual party litigant, violates the Equal Protection Clause as well. *Kentucky Finance Corp.* v. *Paramount Auto Exchange*, 262 U.S. 544 (1923).

Respondent, as Attorney General and Reporter of the State of Tennessee, is the executive head of the legal department of State government. Tenn. Code Ann. § 8-6-102. As such, he is the State's principal litigation counsel, charged with broad discretionary power to represent the State and its agencies in prosecution and defense of civil and certain criminal matters in both state and federal courts and to defend the constitutionality of all legisla-

tion of statewide applicability. Tenn. Code Ann. §§ 8-6-109 and 110.[8]

The Tennessee Civil Investigative Demand statute additionally confers upon Respondent what the Supreme Court of Tennessee accurately described as "the awesome power" to issue compulsory process (612 S.W.2d at 456; App. 4a.):

> "The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter." (Tenn. Code Ann. § 8-6-401)

In the exercise of those powers, Respondent may "require the attendance of witnesses or the submission of documents, or both." Tenn. Code Ann. § 8-6-402.

CID's are not merely precatory appeals to civic duty, for any refusal to comply with a demand

> "Shall be certified to the chancery court . . . and such chancery court *shall* exercise the authority granted it by law in the treating of contempt of court matters . . . all to the end that the witness shall be compelled to appear to give testimony . . ." (Tenn. Code Ann. § 8-6-404) (emphasis supplied)

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[8] Representation of the State in criminal matters at the trial level is generally reserved to the elected District Attorneys General of the several judicial districts of the State. *See* Tenn. Code Ann. § 8-7-103. There are, however, a number of specific statutes giving concurrent power to the Attorney General and the local district attorney to enforce particular provisions of State law. *See, e.g.*, Tenn. Code Ann. § 47-18-108 (prosecutions under the Consumer Protection Act); Tenn. Code Ann. § 53-4505 (prosecutions under the Sanitary Landfill Areas Act); Tenn. Code Ann. § 58-1543 (prosecutions under the Surface Mining Act).

A. The Due Process Clause of the Fourteenth Amendment, with exceptions not here pertinent, mandates that discovery "be a two-way street". *Wardius* v. *Oregon*, 412 U.S. 470, 475 (1973). The court below, in upholding the awesome secret discovery procedures made available under the challenged statute exclusively to the State of Tennessee, decided an important federal question in conflict with an applicable decision of this Court.

The contrasts between Respondent's unilateral CID powers and normal pre- and post-complaint reciprocal discovery procedures with their attendant protective features show the challenged statute to be an anathema to the adversary system of justice. Respondent, having chosen his opponents and selected the issues to be litigated, wields the unlimited power to build his case in secret under aegis of judicial contempt powers. The conflict between that power and due process principles established by this Court is the source of the due process issue here addressed.

In *Wardius* v. *Oregon*, 412 U.S. 470 (1373), this Court declared constitutionally infirm a rule which required criminal defendants to disclose the names of their alibi witnesses, but imposed no corresponding obligation on the State to identify its rebuttal witnesses. Noting that due process did not require the State to adopt any discovery procedures, this Court held "that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* at 475.[9]

Petitioner will show that discovery under the challenged statute is a decidedly one-way street, reserved exclusively

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[9] Moreover, although the amount of discovery available to the parties is not generally of constitutional concern, "[t]his Court . . . has been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Id.* at 474 n.6 (citations omitted).

to Respondent, contrary to the teachings of *Wardius*. The Supreme Court of Tennessee ruled, however, that due process was not offended by this disparity in discovery—

> "We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra*. A CID can be issued by the attorney general and reporter only in two circumstances—one where the state is a party litigant, the other where there is reasonable cause to indicate the state will be a party litigant. Where the state is a party litigant, adversaries of the state are afforded a procedure for pretrial discovery. *See* Rules 26 through 37 of the Tennessee Rules of Civil Procedure. In those instances where there is reasonable cause to indicate that the state will be a party litigant, the CID is an investigatory proceeding, not an adjudicatory proceeding as in *Wardius, supra*. The purpose of an investigatory proceeding 'is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946).
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> "The advantage, if any, conferred upon the state by having the statutory right to pre-complaint discovery is minimal and is negated upon commencement of an adjudicatory proceeding by the fact that the state's adversary then has full discovery rights." (612 S.W.2d at 457-58; App. 7a-8a) (Citations omitted).

This reasoning will not withstand critical analysis.

The availability of mutual discovery procedures upon commencement of adjudicatory proceedings cures neither the disparity in pre-complaint use of CID powers dis-

cussed below nor the advantage the Attorney General enjoys post-complaint as he continues to build his case in secret. Certainly, once litigation is pending both the State and its adversary may conduct mutual discovery under the applicable rules of civil procedure. The State has given its litigation counsel, however, additional discovery powers not available to opposing counsel, additional powers markedly different from those available under the rules of civil procedure. Most notably, in CID proceedings the parties engaged in the underlying litigation with the State are not permitted to attend. There is no opportunity to cross-examine or make appropriate objections. *Compare with* Fed.R.Civ. P. 30(b)(1); Tenn.R.Civ.P. 30.02(1). The State's adversaries have no way of protecting trade secret information in the hands of the witness or asserting any privilege which the witness may be unwilling or unable to interpose or of which the witness may be ignorant. *Compare with* Fed.R.Civ.P. 30(d); Tenn.R.Civ.P. 30.04. Finally, the usual course of discovery is always subject to the powers of the court in which the action is pending to "protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c); Tenn.R.Civ.P. 26.03. The secret inquisition under the challenged statute, however, proceeds at the unfettered whim of the interrogator. Thus, the State's attorney is uniquely privileged to engage in compelled, secret discovery in his preparation for trial. Although his adversary might be able to ultimately discovery some of the fruits of such a probe, the ability to do so is not clear in light of statutes limiting information disclosures by the Attorney General. Tenn. Code Ann. §§ 8-6-407, 10-7-504(d). In short, the post-complaint discovery exclusively available to Respondent bestows upon him a fundamentally unfair litigation advantage, subjecting Petitioner to a form of "trial by ambush" in violation of due process principles recognized by this Court.

Pre-complaint use of CID power exposes potential adversaries of the State to even greater risk of irretrievable loss of the right to a fair trial. Quite apart from his post-complaint privileges and powers, the CID statute grants the State's attorney compulsory process to conduct a unilateral, totally secret and wholly unlimited probe into "contemplated" litigation. The State's targeted adversaries, by comparison, have no means of compelling discovery prior to commencement of litigation, save in exceptional circumstances. Fed.R.Civ.P. 27(a); Tenn.R.Civ. P. 27.01. The State of Tennessee has arrogated to its trial counsel the unfettered and exclusive power to buttress the State's claim or defense before the adjudicatory process has been formally instituted.

At the pre-complaint stage, adverse parties are not even aware that Respondent is likely to bring suit on behalf of the State, much less the specific charges being contemplated by the Respondent. The State "pre-discovers" its case under powers of compulsory process, without affording the targeted adversary notice or opportunity to appear or cross-examine. This "pre-discovery" also enables Respondent to solidify witnesses' testimony under court compulsion even before suit is commenced, foreclosing meaningful contemporaneous cross-examination. While Respondent is compelling testimony and examining documents in secret, his target must be endowed with extraordinary powers of precognition in order to even be aware of a need to interview such witnesses and assemble such documentary proof as may be available to them without benefit of compulsory legal process. Thus, the State's adversary may be forced to begin its trial preparation at a time after the Respondent has focused upon it as a target, undertaken extensive, if not complete, discovery and can immediately employ the fruits thereof to his tactical advantage. Moreover, no limitation is statutorily placed upon the use of the fruits of such a probe. Even

if testimony compelled under the statute is not itself useable at trial, it is clear that evidence to be revealed by Respondent for the first time at trial may be derived from leads obtained through CID efforts unknown to the targeted adversary. *See, e.g., Kastigar* v. *United States*, 406 U.S. 441, 459-61 (1972).[10]

The Supreme Court of Tennessee erroneously found no constitutional deficiencies in this extraordinarily imbalanced procedure, declaring that pre-complaint advantages gained by the State were negated by subsequent mutual discovery and labelling the pre-complaint use of a CID as merely "an investigatory proceeding" to which no due process rights attach. 612 S.W.2d at 475; App. 7a, *citing Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1974).[11] As previously noted, pre-complaint advantages enjoyed by the Attorney General are not negated by post-complaint utilization of mutual discovery procedures. The characterization of pre-complaint use of a CID as part of "an investigatory proceeding" squares neither with the explicit provisions of the challenged statute, nor with other decisions of this Court in similar contexts.

Although never addressed by this Court in the civil litigation context, this Court has recognized in other contexts that the line between "investigatory" and "accusatory" stages is not drawn at the time of mere issuance of formal papers. The governmental process shifts from "investigatory" to "accusatory" when the investigation

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[10] Recognizing the multifarious and subtle ways in which testimony could be indirectly used, this Court imposed upon the government the "heavy burden" of negating use by affirmative proof that the trial "evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

[11] The court below borrows heavily from precedent sustaining administrative subpoenas. *See* 612 S.W.2d at 457-58; App. 7a. However, Respondent is litigation counsel for the State, not an administrative agency charged with interpreting and enforcing a narrow regulatory scheme.

focuses upon a particular target. At that point the adversary system begins to operate and constitutional rights attach. *Escobedo* v. *Illinois*, 378 U.S. 478, 485-486 (1964)[12] Attachment of constitutional rights at that stage is crucial, for occurrences at that stage could "affect the whole trial" since rights may be "irretrievably lost, if not then and there asserted . . . ." Absent such protections the trial may become "no more than an appeal from the interrogation . . . ." *Id.* at 486, 487.

The central feature of Tennessee's statutory scheme mandates the pre-existence of a concrete adversary relationship between the State and others—the State of Tennessee must be a "party litigant" or there must be "reasonable cause to indicate it will be" a party litigant. Tenn. Code Ann. § 8-6-401. The parties and issues implicated in this adversary relationship must also be crystalized, for Respondent is obliged to specify in the demand the "case or matter" involved and identify "the parties to the inquiry." Tenn. Code Ann. § 8-6-402.[13] The statute thus mandates that issuance of a pre-complaint CID must

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[12] The Court of Appeals for the District of Columbia recently observed:

> At some point, the prosecutor's inquiry becomes sufficiently focused so that he is preparing a case against a particular defendant rather than seeking a defendant against whom he may prepare a case. At this point his efforts become advocatory: They are intimately associated with the sensitive decision of whether or not to initiate a particular prosecution, a decision which is left to advocates, not investigators. That point marks the critical event entitling him to absolute rather than qualified immunity from civil liability arising out of his subsequent actions. *Simons* v. *Bellinger*, 644 F.2d 774 (D.C. Cir. 1980).

[13] The court below held that the particular demand issued in this case was invalid for failure to comply with these statutory requirements and for failure to have been issued by Respondent personally. *See* 612 S.W.2d at 456; App. 2a.

await the completion of informal, noncompulsory, investigative activities sufficient to give Respondent reasonable cause to believe that the State of Tennessee will be involved in litigation with identified parties concerning particular matters. At that juncture the formality of a summons and complaint is just that—a mere formality.

The likelihood of irretrievable loss of the right to a fair adversary proceeding, which was of concern in *Escobedo*, is similarly implicated in civil cases where pre-complaint use of a CID results in the taking of testimony and production of documents in the Attorney General's chambers while opposing counsel are excluded. Due process protections forbid the State's circumvention of the adversary system by bestowing solely upon its litigation counsel the pre-complaint power to forcibly assemble its case in secret.

The statute at issue here is markedly different from that before this Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upon which the court below relied.[14] As this Court pointed out, under that statutory scheme "Congress has made no requirements in terms of showing of 'probable cause' . . . . [T]he Administrator's . . . investigative function, in searching out violations with a view to securing enforcement of the

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[14] The enabling legislation involved in *Oklahoma Press* provided, in pertinent part,

> "The administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." *Id.* at 199 n.23.

Act, is essentially the same as the grand jury's . . . ." *Id.* at 215-16 (footnote omitted). *Accord, e.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (Administrative agency's power of investigation "analogous to the Grand Jury, which . . . can investigate merely on suspicion that the law is being violated or even just because it wants assurance that it is not.") The grand jury analogy is particularly pertinent to the instant case, for due process forbids the use of grand jury process once the grand jury has found probable cause and handed down its indictment. *E.g., United States* v. *Doss*, 563 F.2d 265, 275-76 (6th Cir. 1977) (*en banc*), and cases cited therein. Similarly, the State may not constitutionally empower its litigation counsel to employ nonreciprocal compulsory discovery techniques after he has "reasonable cause to indicate that [the State] will be a party litigant."

Since it found no due process rights implicated in the challenged statute, the court below made no effort to identify any state interests which justified the disparate treatment of litigants. Petitioner will argue in this Court that no such interests can be found. CID's issued under the challenged statute are not confined to enforcement of any particular regulatory scheme partaking of a public interest—they may range from a simple collision involving a state-owned automobile to the most complicated securities transaction. Respondent may compel the secret production of testimonial and documentary evidence in preparation for trial. No rational basis justifies the substantial litigation advantage which the State has conferred upon its litigation counsel.

B. The State may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily create a favored class of litigants. *Kentucky Finance Co.* v. *Paramount Auto Exchange*, 262 U.S. 544, 551 (1923). The court below, in upholding the secret discovery procedures made available under the challenged statute to the State of Tennessee and withheld from its adversaries, decided an important federal question in conflict with an applicable decision of this Court.

Quite apart from its deprivation of due process, the challenged statute denies equal protection of the laws by creating "favored" and "disfavored" classes of litigants. The State may not arbitrarily favor one class of litigants over another or impose on one class of litigants burdens not imposed on others. *E.g.*, *Kentucky Finance Corp.* v. *Paramount Auto Exchange*, 262 U.S. 544, 551 (1923). By conferring on its litigation counsel the exclusive right to conduct secret, nonreciprocal discovery, the State has radically departed from core concepts of even-handed justice.

As indicated above, there is no rational basis to support a distinction between the State of Tennessee as a litigant, and all other litigants. Even if one focuses exclusively upon the pre-complaint aspects of the challenged statute, it is clear that no legitimate state interest is rationally furthered by the statute. As the statutory predicate for issuing a CID, Respondent must have "reasonable cause to indicate that [the State] will be a party litigant" (Tenn. Code Ann. § 8-6-401) and, as held by the Court of Appeals and affirmed by the Supreme Court of Tennessee, "implementation [of the challenged statute] must be triggered by a decision of the Attorney General, himself, stating with particularity the grounds of his decision, the names of the parties to the . . . expected litigation, [and] the nature of the same . . . ." Slip op. at 13; App. 29a. Given the simplified notice-pleading rules which govern modern civil litigation (e.g., Fed. R.

Civ.P. 8(a); Tenn.R.Civ.P. 8.01), the information required to issue a CID is more than sufficient to frame a complaint and commence the judicial process. Respondent can have no reason to defer litigation or use a CID in lieu of mutual discovery procedures, save a desire to secure a tactical advantage over his opponents. Prevailing in litigation to which it is a party is not a legitimate interest which the State of Tennessee should constitutionally be permitted to further.

The extraordinary and awesome powers conferred by the State of Tennessee upon its litigation counsel to the exclusion of all other litigants does not comport with due process and equal protection of the law which the Fourteenth Amendment requires. A writ of certiorari should be issued to review the judgment of the Supreme Court of Tennessee which upheld the statute granting such power.

Respectfully submitted,

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